

# EXHIBIT “2”

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW  
EDMONDSON, in his capacity as ATTORNEY  
GENERAL OF THE STATE OF OKLAHOMA,  
et al.,

Plaintiff,

v.

TYSON FOODS, INC., et al.,

Defendants.

Case No. 4:05-CV-329-JOE-SAJ

**DEFENDANTS’ REPLY IN SUPPORT OF THEIR MOTION TO STAY PROCEEDINGS  
AND REQUEST FOR EXPEDITED HEARING**

COME NOW Defendants, Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; Cargill, Inc.; Cargill Turkey Production, LLC.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; and Willow Brook Foods, Inc. (collectively, "Defendants"), pursuant to FED. R. CIV. P. 7 and LCvR7.1, and hereby submit the following reply in support of their Motion to Stay proceedings in this matter pending resolution of *State of Arkansas v. State of Oklahoma*, an original action filed in the United States Supreme Court (the "Supreme Court Action") by the State of Arkansas. *See* Exhibit ("Exh.") A to Defs' Mot. to Stay.

## **I. INTRODUCTION**

In its Response to Defendants' Motion to Stay, Oklahoma has attempted to minimize Arkansas's likelihood of success in the Supreme Court Action and the effect such a result would have on this case. However, as explained below, the Supreme Court will likely enjoin Oklahoma from pursuing its interstate pollution claims in this forum and, therefore, preclude Oklahoma from seeking the majority of relief it requests from this Court. Consequently, this Court should stay these proceedings until the Supreme Court has determined exactly which of Oklahoma's claims may properly be heard in this forum. Such a stay would be a proper exercise of this Court's inherent discretion as it would foster judicial economy and guard against a waste of public and private resources while avoiding any conflict with the Supreme Court Action.

## **II. ARGUMENT**

In response to Defendants' Motion to Stay, Oklahoma argues that: (1) only some of its claims need to be stayed, and (2) in effect, a stay is not required because: (a) Arkansas has no

sovereign right to dictate what is lawful within Arkansas; (b) Defendants have no interest in avoiding the substantial costs of litigation; (c) Oklahoma is not required to pursue its claims through the administrative means provided by the Arkansas River Basin Compact (the “Compact”); and (d) the public good is not served by permitting two sovereigns to resolve their dispute in the only forum the Framers thought befit the dignity of two States. As demonstrated below, none of these arguments has merit.

**A. EQUITABLE AND PRACTICAL CONSIDERATIONS WEIGH AGAINST  
PIECEMEAL LITIGATION OF OKLAHOMA’S CLAIMS.**

A district court may properly stay proceedings when, in its judgment, a temporary stay will best serve the administration of justice and support an “economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *accord United Steelworkers of Am. v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003). The decision to stay proceedings pending resolution of a related case represents a district court’s pragmatic determination that, under the circumstances, it is better to await disposition of the related matter. *See Landis*, 299 U.S. at 254. As discussed below, until the Supreme Court Action is resolved, neither the parties nor this Court can discern which of Oklahoma’s claims can be addressed by this Court. Accordingly, this Court should stay the current proceedings, as a stay will best serve the administration of justice and support an “economy of time and effort” for this Court, counsel, and parties to this case. *Landis*, 299 U.S. at 254-55.

Oklahoma argues that the Supreme Court Action only challenges Oklahoma’s ability to assert state law claims arising from conduct occurring in Arkansas. *See Resp.* at 4-5. As such, Oklahoma urges this Court to proceed with Oklahoma’s claims arising from conduct occurring in Oklahoma and federal claims arising from conduct occurring in Arkansas. *See id.* However, this Court must reject Oklahoma’s proposal because it: (1) rests upon a misreading of Arkansas’s Bill

of Complaint; (2) is judicially impractical; and (3) creates a substantial risk of compromising judicial economy, as significant efforts by both the parties and this Court could be wasted should this case proceed and the Supreme Court then rule that Oklahoma is precluded from bringing its already-addressed claims in this forum.

First, Oklahoma reads Arkansas's Bill of Complaint too narrowly. *See* Exh. A to Defs' Mot. to Stay. In its Prayer for Relief, Arkansas asks the Supreme Court to "[e]njoin Oklahoma from prosecuting its interstate pollution-related grievances, including those alleged in Oklahoma's lawsuit before the federal district court, Case No. 4:05-CV-00329-JOE-SAJ, in any forum before a full presentation and exhaustion of remedies before the [Compact] Commission." *Id.* at 16. Oklahoma's federal claims, directed toward conduct occurring in Arkansas, are certainly within the purview of the "interstate pollution-related grievances" Arkansas seeks to enjoin. Thus, Arkansas's Bill of Complaint can only read as a request that the Supreme Court enjoin Oklahoma from prosecuting *all* of its pollution-based claims arising from conduct in Arkansas.

Second, there is no practical way to effectively separate Oklahoma's claims related to conduct occurring in Arkansas from "the Oklahoma portion of the State's case." Resp. at 2. Oklahoma's claims are directed toward the activities of "thousands of farms" located in both Oklahoma and Arkansas. *See* Plaintiff's First Amended Complaint at ¶¶ 1, 22. The vast majority of these targeted farms are located in Arkansas<sup>1</sup> and the Oklahoma Attorney General

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<sup>1</sup> Of the approximately 2,871 poultry growers located within the IRW, approximately 2,363 are in Arkansas and only 508 are in Oklahoma. *See* Written Statement of Oklahoma Attorney General Drew Edmondson, excerpts of which are attached hereto as Exh. "1" at 5. In light of these facts, it would make little sense for this Court to accept Oklahoma's proposal of moving forward with only the "Oklahoma portion of the State's case," Resp. at 2, because doing so would provide no means of abating or remediating the majority of the harm alleged by Oklahoma.

has stated that most of the water quality problems in the IRW allegedly arise from the actions of Arkansas poultry growers. *See* Exh. 1 at 5. Therefore, it would not be possible to litigate only those claims arising from conduct occurring within Oklahoma because any assignment of liability to poultry operations in Oklahoma would necessarily require extensive development of the facts concerning activities and conditions occurring in Arkansas.

Finally, proceeding with this case without resolution of the Supreme Court Action risks compromising judicial economy, as efforts by the parties and this Court might later be undermined. Oklahoma's claims relate to the alleged impact that thousands of poultry growing operations have had upon more than a million acres of land over the past two decades. *See* Plaintiff's First Amended Complaint at ¶¶ 1, 22. Litigating these claims will require extraordinary expenditures of legal resources to conduct extensive discovery and virtually unprecedented development of expert testimony. Because approximately eighty percent (80%) of the farms targeted by Oklahoma are located in Arkansas, it seems quite reasonable to suspect that approximately eighty percent of the efforts put forth by the parties and this Court—as this action proceeds—would be undermined if the Supreme Court then determined that Oklahoma may not pursue its interstate pollution-based claims in this forum. *See* Exh. 1. This Court should not countenance such risk, but should instead stay the proceedings in this matter, pending resolution of the Supreme Court Action.

**B. A STAY OF THESE PROCEEDINGS IS PROPER UNDER TENTH CIRCUIT PRECEDENT.**

In *United Steelworkers of Am. v. Oregon Steel Mills, Inc.*, 322 F.3d 1222 (10th Cir. 2003), the Tenth Circuit identified four factors that a court “should consider” when assessing the propriety of a stay—whether: (1) defendants are likely to prevail in the related proceeding; (2) absent a stay, defendants will suffer irreparable harm; (3) the issuance of a stay will cause

substantial harm to the other parties to the proceeding; and (4) public interests are at stake. *See id.* at 1227. Although Oklahoma insists that all four factors must be “clearly established” for a stay to be granted, Resp. at 5-6, the Tenth Circuit does not subscribe to such a formulaic approach. *See id.* at 1227; *Landis*, 299 U.S. at 254. Instead, these factors must be weighed in light of case-specific circumstances, and this Court should exercise its discretion to determine whether the equities and practical concerns weigh in favor of temporarily halting the proceedings. *See id.* at 1277; *Clinton v. Jones*, 520 U.S. 681, 706 (1997). Such an approach follows the well-established principle that each district court has the “power to stay proceedings . . . to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *United Steelworkers*, 322 F. 3d at 1277 (citing *Landis*, 299 U.S. at 254).

Moreover, as demonstrated below, even if all four of the *United Steelworkers* factors were required before a stay could be granted, each of those factors has been met in this case.

**1. The Supreme Court is Likely to Grant the Relief Requested by Arkansas in the Supreme Court Action.**

Oklahoma insists that the Supreme Court is unlikely to grant Arkansas’s Motion and exercise its original jurisdiction over Arkansas’s claims. This assertion is wrong. In fact, over the past forty years, the Supreme Court has exercised its original jurisdiction to hear almost two out of every three cases involving controversies between States.<sup>2</sup> Because Arkansas’s claims in the Supreme Court Action are strong, it is likely such claims will be heard by the Supreme Court.

First, Oklahoma concedes that Arkansas has standing both to assert its own rights to protect its sovereignty, and to assert the rights of its citizens *parens patriae*. *See* Resp. in Opp. to

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<sup>2</sup> *See, e.g.,* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court’s Management of its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, App. B (1993).

Mot. to Dis. Counts 4-10, at 27 n.20, Docket No. 129; Resp. to Mot. to Stay at 16. Accordingly, it is likely that the Supreme Court will grant Arkansas's request that the Supreme Court adjudicate its claims. As explained in Defendants' Motion to Stay, this action represents an attempt by Oklahoma to impose its legal standards extraterritorially in an effort to regulate commercial activity lawfully occurring within Arkansas's borders. It is well-established that a State law having the "practical effect" of regulating commerce in other States violates the Commerce Clause. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (state action that "directly regulates . . . interstate commerce" violates the Commerce Clause). As explained in Arkansas's Bill of Complaint, the Supreme Court "has long interpreted the Commerce Clause, although silent in its text, as operating as an affirmative restraint on State power over interstate commerce. *See Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); Exh. A to Defs' Mot. to Stay at 13. As such, the federal government maintains an exclusive right over regulation of interstate commerce - a principle which the Supreme Court has deemed worthy of its exclusive and original jurisdiction when a State challenges laws imposed on it by a sister State. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 446-54 (1992).

In its Response to Defendants' Motion to Stay, Oklahoma concedes that all States can assert claims to protect their citizens *parens patriae*, something which Arkansas has done in its Supreme Court Action. Resp. at 16.; Exh. A to Mot. to Stay at 19-21. However, it is also apparent that Arkansas has an interest of its own - an interest which, under *Wyoming*, can only be raised before the Supreme Court because it directly affects Arkansas's status as a co-equal sovereign. *See Wyoming*, 502 U.S. at 452. Indeed, in other pleadings before this Court, Oklahoma has asserted that *only* Arkansas has standing to raise alleged "violations of the sovereignty of Arkansas, [and that] the Supreme Court has held that the plaintiff generally must

assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” Resp. in Opp. to Mot. to Dis. Counts 4-10, at 27 n.20, Docket No. 129. Arkansas is, therefore, well positioned to be heard by the Supreme Court because Arkansas asserts arguments for its citizens (including some of the defendants) while also protecting its own sovereign right to be protected from Oklahoma’s attempt to regulate within Arkansas’s borders.

Second, Oklahoma’s arguments about the validity of Arkansas’s Commerce Clause claims are incorrect. Oklahoma’s claim that its application of Oklahoma law within Arkansas should be evaluated under the balancing test outlined in *Pike v. Bruce Church*, 397 U.S. 137 (1970), is misguided. The *Pike* test does nothing more than examine indirect, or “incidental” effects on interstate commerce by evaluating whether neutral intrastate regulation unnecessarily burdens interstate commerce. *Id.* at 142. *Pike*, however, is not applicable to situations such as the one here, where one State seeks to directly regulate within the borders of another State. *See Brown-Forman*, 476 U.S. at 578-79. In fact, when the Supreme Court has determined that a State seeks to impose its laws on conduct that occurs within a sister State, it has “generally struck down the [attempted extraterritorial regulation] without further inquiry.” *Id.* at 579. Extraterritorial regulation of out-of-state commerce is thus constitutionally impermissible. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (States cannot regulate “commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”).

Oklahoma is also incorrect in claiming that its action is permissible because it attempts to enjoin the conduct of Arkansas citizens under Oklahoma common law rather than Oklahoma positive law. The Supreme Court has held that “regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay



compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also BMW v. Gore*, 517 U.S. 559, 572 n.17 (1996) (“State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”). Therefore, it is of no moment that Oklahoma is trying to regulate in Arkansas through application of Oklahoma common law. In sum, Oklahoma’s reliance on *Pike* is misplaced and its distinction between common and positive law is inapplicable.

Finally, the Supreme Court is the only adequate forum in which Arkansas’s Compact claim can be heard. The States of Arkansas and Oklahoma have agreed and consented to be sued in district court under provisions of the Compact. *See* Compact Art. XIII.B. Resorting to district court adjudication is, however, available only for a dispute involving “pollution of the waters . . . alleged to be in violation of the provisions of [the] compact.” 33 U.S.C. § 466g-1(a)(2). Oklahoma has never asserted that the alleged pollution from Defendants violates the Compact. In fact, Oklahoma does not find the Compact applicable to the situation at hand. In the Supreme Court Action, Arkansas argues that by doing so, Oklahoma has violated the Compact by failing to bring the issue first before the Compact Commission. As such, neither party seeks to pursue an enforcement action with regard to the Compact and the case is governed by Congress’s mandate that controversies between States are within the exclusive and original jurisdiction of the Supreme Court. *See* 28 U.S.C. § 1251(a); Exh. A to Mot. to Stay at 28.

Moreover, by asking the Supreme Court to find Oklahoma’s action invalid, Arkansas also seeks clarification of the Compact and its grant of jurisdiction to the Compact Commission over interstate water quality issues. The Supreme Court has “a serious responsibility to adjudicate cases where there are actual, existing controversies’ between States over the waters in interstate

streams.” *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991) (quoting *Arizona v. California*, 373 U.S. 546, 564 (1963)). Where an interstate compact is the focal point of such a controversy, the Supreme Court alone can settle the dispute. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (noting that the Supreme “Court . . . must have final power to pass upon the meaning and validity of compacts”). Because the Supreme Court Action is centered around the Compact, it is likely that Arkansas’s request for Supreme Court adjudication will be granted.

**2. Allowing this Case to Proceed Without Resolution of the Supreme Court Action Creates the Risk that Defendants Will Suffer Irreparable Harm.**

Because the Supreme Court Action involves issues substantially similar to those encompassed by this matter, simultaneous litigation in both fora creates the likelihood of developing inconsistent records and remedies. This scenario would cause irreparable harm to Defendants by subjecting them to incongruent judgments and placing them in the impossible position of complying with potentially conflicting regulatory standards. Moreover, because Oklahoma is asserting claims that provide for recovery under theories of joint and several liability, Oklahoma’s suggested course of proceeding with only “the Oklahoma portion of the State’s case” creates the risk that certain Defendants will suffer irreparable harm if actors in Oklahoma are held responsible for actions occurring in Arkansas.

**3. Oklahoma Will Not Suffer Substantial Harm if This Court Were to Stay Proceedings Pending Resolution of the Supreme Court Action.**

There are several reasons why Oklahoma will not suffer substantial harm if this Court stays these proceedings pending resolution of the Supreme Court Action. First, Oklahoma can - and under its Compact with Arkansas, should - at any time, bring its interstate water-pollution grievances before the Compact Commission. The Commission has the power to hold hearings, issue orders, and take actions necessary to protect the waters of the IRW, and its members have several years of combined experience and expertise in addressing water pollution within the

IRW. *See* OKLA. STAT. tit. 82, § 1421. Indeed, the Compact Commission presents an alternative, adequate, and arguably, more appropriate forum for Oklahoma to pursue its grievances concerning interstate water quality. As such, Oklahoma will not suffer *any*—much less substantial—harm if this Court stays the proceedings in this action.

Second, Oklahoma will not suffer any irreparable harm by the issuance of a stay because it is a party to the Supreme Court Action. Thus, Oklahoma will have a full and fair opportunity to participate in the adjudication of whatever claims are accepted by the Supreme Court. The fact that Oklahoma wants to avoid litigating before the Supreme Court does not make the proceedings in that forum unfair or harmful to Oklahoma's interests.

#### **4. Public Interests Weigh in Favor of Staying These Proceedings.**

Arkansas has asserted strong claims that Oklahoma's lawsuit in this Court violates the binding agreement that it entered into with Arkansas; the Commerce Clause; principles of federalism; and the due-process protections afforded citizens of all States. The Framers of the Constitution created jurisdiction within the Supreme Court as a mechanism for adjudication of such controversies. Respecting this constitutional framework is fundamentally in the public interest and any attempts to avoid or frustrate it should be rejected. Oklahoma's desire to continue with its action in this Court would create a substantial risk of wasting both this Court's and the parties' resources; present the Supreme Court with a moving target; and undermine the constitutional mechanism developed by the Framers for addressing such an interstate dispute. Without question, it serves the public interest for this Court to stay the current proceedings.

### **III. CONCLUSION**

For the foregoing reasons, this Court should stay proceedings in this matter pending resolution of the Supreme Court Action.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of December, 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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and I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

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